

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2590

No. 74-2590

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET M. LANDON,

Plaintiff-Appellant,

-against-

TWENTIETH CENTURY-FOX FILM CORPORATION
and COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLEES' BRIEF

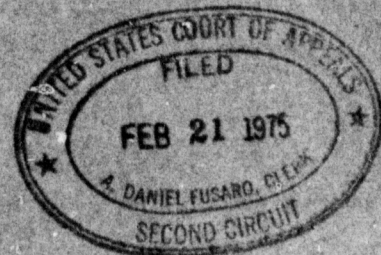
ROGERS & WELLS
Attorneys for Appellees
200 Park Avenue
New York, New York 10017

Of Counsel:

Youngman, Hungate & Leopold
1801 Century Park East
Los Angeles, California 90067

-and-

William R. Glendon
Guy C. Quinlan
Stephen Froling



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET M. LANDON,

Plaintiff-Appellant,

-against-

TWENTIETH CENTURY-FOX FILM CORPORATION
and COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLEES' BRIEF

ROGERS & WELLS
Attorneys for Appellees
200 Park Avenue
New York, New York 10017

Of Counsel:

Youngman, Hungate & Leopold
1801 Century Park East
Los Angeles, California 90067

-and-

William R. Glendon
Guy C. Quinlan
Stephen Froling

TABLE OF CONTENTS

CASES, STATUTES AND OTHER AUTHORITIES	ii
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	
Preliminary Statement	2
Statement of Facts	4
ARGUMENT	
I. UNDER THE CLEAR TERMS OF THE 1944 AGREEMENT BETWEEN MRS. LANDON AND FOX, FOX WAS LICENSED TO MAKE AND EXHIBIT ON TELEVISION A SERIES OF MOTION PICTURES AND, ACCORDINGLY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST CLAIM WAS PROPERLY GRANTED	9
II. MRS. LANDON'S ARGUMENTS DO NOT RAISE ANY TRIABLE ISSUES OF MATERIAL FACT	10
III. THE DISTRICT COURT CORRECTLY HELD THAT THE SECOND CLAIM WAS INSUF- FICIENT AS A MATTER OF LAW, AND WAS FURTHER BARRED BY THE STATUTE OF LIMITATIONS	41
CONCLUSION	51

TABLE OF CASES, STATUTES AND AUTHORITIES

Cases:	<u>Page</u>
<u>Abercrombie v. Lum's, Inc.,</u> 345 F.Supp. 387 (S.D.Fla. 1972)	45
<u>Adkins v. E. I. duPont de Nemours & Co.,</u> 181 F.2d 641 (10th Cir. 1950), <u>cert. denied</u> , 340 U.S. 835	37
<u>American Mfg. Mut. Ins. Co. v. American</u> <u>Broadcasting-Paramount Theatres,</u> 388 F.2d 272, (2d Cir. 1967)	44
<u>American Mfg. Mut. Ins. Co. v. American</u> <u>Broadcasting-Paramount Theatres,</u> 446 F.2d 1131 (2d Cir. 1971), <u>cert. denied</u> , 404 U.S. 1063	42, 43, 44
<u>American Pipe & Construction Co.</u> <u>v. Utah</u> , 414 U.S. 538 (1974)	50
<u>Autry v. Republic Productions, Inc.,</u> 213 F.2d 667 (9th Cir. 1954), <u>cert. denied</u> , 348 U.S. 858	15
<u>Bartsch v. Metro-Goldwyn-Mayer, Inc.,</u> 391 F.2d 150 (2d Cir. 1968), <u>cert. denied</u> , 393 U.S. 820	10, 12, 13, 23, 38
<u>Beal v. Lindsay,</u> 468 F.2d 287, (2d Cir. 1972)	26
<u>Belliston v. Texaco, Inc.,</u> 455 F.2d 173, (10th Cir. 1972), <u>cert. denied</u> , 408 U.S. 928	42
<u>Bigelow v. RKO Radio Pictures, Inc.,</u> 327 U.S. 251 (1946)	48
<u>Capital Temporaries, Inc. of Hartford</u> <u>v. The Olsten Corp.,</u> F.2d _____, 1974-2 CCH Trade Cases, Para. 75,303, <u>aff'g</u> , 365 F.Supp. 888 (D.Conn. 1973)	44, 45, 46
<u>Carmichael v. Mills Music, Inc.,</u> 121 F.Supp. 43 (S.D.N.Y. 1954)	49, 50

<u>Davis v. E. I. duPont de Nemours & Co.,</u> 240 F.Supp. 612 (S.D.N.Y. 1965)	35
<u>Dillon v. Anderson,</u> 43 N.Y. 231, (1870)	32
<u>Donnelly v. Guion,</u> 467 F.2d 290, (2d Cir. 1972)	26
<u>Dyer v. MacDougall,</u> 201 F.2d 265, (2d Cir. 1952)	37
<u>Eskimo Pie Corporation v. Whitelawn Dairies, Inc.,</u> 284 F.Supp. 987, (S.D.N.Y. 1968)	27, 32
<u>Ford Motor Co. v. United States,</u> 335 U.S. 303 (1948)	42
<u>Fred Fisher Music Co. v. M. Witmark & Sons,</u> 318 U.S. 643, (1943)	48
<u>Frigalment Importing Co. v.</u> <u>BNS International Sales Corp.,</u> 190 F.Supp. 116 (S.D.N.Y. 1960)	27
<u>G. Ricordi & Co. v. Paramount Pictures,</u> 92 F.Supp. 537, (S.D.N.Y. 1950) mod. on other grounds 189 F.2d 469 (1951), cert. denied 342 U.S. 849	15
<u>Gelfand v. Tanner Motor Tours, Ltd.,</u> 450 F.2d 786 (2d Cir. 1971)	33
<u>Goodis v. United Artists Television, Inc.,</u> 425 F.2d 397 (2d Cir. 1970)	16, 17, 18
<u>Hellman v. Samuel Goldwyn Prods.,</u> 26 N.Y.2d 175, (1970)	14
<u>Herman Schwabe, Inc. v. United Shoes Mach. Corp.,</u> 297 F.2d 906 (2d Cir. 1962), cert. denied, 369 U.S. 865	48
<u>Hollywood Plays, Inc. v. Columbia</u> <u>Pictures Corporation,</u> 77 N.Y.S.2d 568 (Sup. Ct. N.Y. Co. 1947), aff'd, 274 App. Div. 912 (1st Dep't), rev'd on other grounds, 299 N.Y. 61 (1949)	29, 35, 36

<u>In re 7-Eleven Franchise Antitrust Litigation,</u> 1974-2 CCH Trade Cases, Para. 75,429 (N.D.Cal. 1974)	45
<u>Kentucky Fried Chicken Corp. v.</u> <u>Diversified Packaging Corp.,</u> 1974-2 CCH Trade Cases, Para. 75,422 (S.D. Fla. 1974)	45
<u>Krstovic v. Van Buren,</u> 235 N.Y. 96 (1923)	32
<u>Laba v. Carey,</u> 29 N.Y.2d 302 (1971)	32
<u>Lah v. Shell Oil Co.,</u> 50 F.R.D. 198 (S.D.Ohio 1970)	45
<u>Landon v. Twentieth Century-Fox Film</u> <u>Corporation and Columbia Broadcasting</u> <u>System, Inc.,</u> 384 F.Supp. 450 (S.D.N.Y. 1974)	3, 4, 10, 11, 17, 20, 21, 25, 30, 34, 35, 42, 49
<u>Leumi Fin. Corp. v. Richter,</u> 17 N.Y.2d 166, (1966)	33
<u>Mandeville Island Sugar Farms v.</u> <u>American Crystal Sugar Co.,</u> 334 U.S. 219 (1948)	42
<u>Manners v. Morosco,</u> 258 F. 557, (2d Cir. 1919), rev'd on other grounds, 252 U.S. 317	39
<u>Miller Music v. Daniels,</u> 362 U.S. 373 (1960)	48
<u>Poller v. Columbia Broadcasting Co.,</u> 368 U.S. 464, (1962)	46
<u>Poster Exchange, Inc. v.</u> <u>National Screen Service Corp.,</u> 456 F.2d 662, (5th Cir. 1972)	49
<u>Preminger v. Columbia Pictures Corp.,</u> 49 Misc.2d 363 (Sup.Ct. N.Y.Co. 1966), aff'd, 25 A.D.2d 830 (1st Dep't 1966), aff'd, 18 N.Y.2d 659 (1966)	38

<u>Raleigh Asso. v. Henry,</u> 302 N.Y. 467, (1951)	32
<u>Riley v. Mayor of N.Y.,</u> 96 N.Y. 331, (1884)	32
<u>Robbins v. Gould,</u> 278 F.2d 116 (5th Cir. 1960)	37
<u>Rose v. Bourne, Inc.,</u> 176 F.Supp. 605, (S.D.N.Y. 1959), aff'd, 279 F.2d 79, (2d Cir. 1960), cert. denied 364 U.S. 880	48
<u>Rossiter v. Vogel,</u> 134 F.2d 908 (2d Cir. 1943)	50
<u>Rossiter v. Vogel,</u> 148 F.2d 292 (2d Cir. 1945)	48
<u>Saunders v. National Basketball Association,</u> 348 F.Supp. 649 (N.D.Ill. 1972)	47
<u>Songer v. Mack Trucks, Inc.,</u> 23 A.D.2d 544 (1st Dep't 1965)	33
<u>Thomas v. Mutual Benefit Health & Accident Ass'n,</u> 220 F.2d 17 (2d Cir. 1955)	37
<u>United States v. Griffith,</u> 334 U.S. 100 (1948)	42
<u>United States v. Loew's,</u> 371 U.S. 38 (1962)	41, 43
<u>United States v. Paramount Pictures,</u> 334 U.S. 131 (1948)	41
<u>United States Nav. Co. v. Black Diamond Lines,</u> 147 F.2d 958 (2d Cir. 1945)	32
<u>Vitaphone Corp. v. Hutchinson Amusement Co.,</u> 28 F.Supp. 526 (D.Mass. 1939), conforming to 93 F.2d 176 (1st Cir. 1937)	15
<u>Walling v. Richmond Screw Anchor Co.,</u> 154 F.2d 780, (2d Cir. 1946), cert. denied, 328 U.S. 870	33
<u>Warner Bros. Pictures v. Columbia Broadcasting Systems,</u> 216 F.2d 945, (9th Cir. 1954), cert. denied, 348 U.S. 971	16

<u>Wells v. Bailey,</u> 49 N.Y. 464, (1872)	27
<u>Wexley v. KTTV, Inc.,</u> 108 F.Supp. 558 (S.D.Cal. 1952), aff'd, 220 F.2d 438 (9th Cir. 1955)	21, 39
<u>Wilson Sullivan Co. v.</u> <u>Int'l Paper Makers Realty Corp.,</u> 307 N.Y. 20, (1954)	32
<u>Zenith Radio Corp. v. Hazeltine Research,</u> 401 U.S. 321 (1971)	47, 49
 Statutes:	
17 U.S.C. § 1(b)	22
17 U.S.C. § 5	7
15 U.S.C. § 15(b)	47
 Rules:	
Federal Rules of Appellate Procedure	
Rule 28(a)	1, 41
Federal Rules of Civil Procedure	
Rule 56	30
Rule 56(e)	26
Rule 56(f)	31, 37
 Miscellaneous:	
37 C.F.R. § 202.15	7, 8
Copyright Office, <u>Compendium of Copyright</u> <u>Office Practices</u>	8
6 Moore Fed. Prac. ¶ 56.13	33
2 Nimmer Copyright § 144	9
Richardson on Evidence § 264	32

MARGARET M. LANDON,

Plaintiff-Appellant,

-against-

TWENTIETH CENTURY-FOX FILM CORPORATION
and COLUMBIA BROADCASTING SYSTEM, INC.,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLEES' BRIEF

Defendants-Appellees Twentieth Century-Fox
Film Corporation ("Fox") and Columbia Broadcasting System,
Inc. ("CBS") submit this brief in opposition to the appeal
of plaintiff-appellant, Margaret M. Landon ("Mrs. Landon").

STATEMENT OF THE ISSUE*

Whether the District Court (Lasker, J.) correctly

* Although it is not raised in Mrs. Landon's Statement of the Issue and not argued in her brief, an Amicus raises and argues an additional point concerning a purported tie-in claim under the antitrust laws. While the claim is not properly before the Court under Rule 28(a), F.R. App. P., we nevertheless respond to the Amicus, *infra*, pp. 41 et seq.

determined, on defendants' motion for summary judgment, that an agreement between Mrs. Landon and Fox which expressly granted to Fox the right to make any and all motion picture versions of the literary property "Anna and the King of Siam" and to televise the same gave to Fox the right to make a series of motion picture films based on the property for television broadcast and to permit CBS to broadcast them over its television network.

Preliminary Statement

In late 1944, Fox and the William Morris Agency, Inc., Mrs. Landon's literary agents, negotiated an integrated agreement which was executed by Fox and Mrs. Landon on or about December 8 of that year ("the Agreement").* This Agreement granted to Fox the right to make multiple motion picture versions of the literary property and the further right to televise these motion picture versions. The Agreement expressly reserved to Mrs. Landon only the right to telecast versions of the literary property "direct from living actors." Mrs. Landon now takes the position that the Agreement did not grant (or impliedly reserved to her) the right to make short motion pictures for first exhibition on TV. Thus, she contends (Br. p. 30):

* The pertinent provisions of the Agreement appear at Joint Appendix, pages 14-25 ("JA 14-25").

"She granted Fox the right only to make feature length motion pictures for presentation to theater audiences and to subsequently telecast such motion pictures."

Accordingly, she contends that the subject films are not motion pictures and thus are not licensed.

Presented with this claim, Fox and CBS moved for summary judgment on the ground that the Agreement, on its face, plainly permitted Fox to televise any and all motion pictures based on the work -- without regard to the length of the picture or Fox's intention about prior or subsequent theater exhibitions. Mrs. Landon cross-moved for summary judgment, also arguing that the Agreement contained no ambiguities and that no issues of fact remained for trial.

Following submission of these cross-motions, Judge Lasker of the United States District Court for the Southern District of New York rendered a lengthy opinion holding that there were no issues of material fact and that the Agreement plainly and unambiguously granted the pertinent rights to Fox. The Memorandum and Order is reported at 384 F. Supp. 450 (S.D.N.Y. 1974) and is reprinted at JA 478 et seq.

Mrs. Landon also made various peripheral claims below, all of which have now been abandoned or not briefed. She has apparently delegated to an Amicus the task of briefing her claim allegedly arising under the antitrust laws. The

Amicus asserts that the simultaneous license by Mrs. Landon of the original and renewal copyright terms in her literary work constituted an unlawful tie-in. Judge Lasker found, in the circumstances of this case, (i) that the Record concededly demonstrated that no "actual coercion" was exercised, although this is a necessary element to the claim, and (ii) that, in any event, Mrs. Landon's attempt to raise her 28 year old claim was barred by the Statute of Limitations.

Accordingly, summary judgment was granted to Fox and CBS on all counts on November 14, 1974 and Mrs. Landon's cross-motion was denied.

STATEMENT OF FACTS

The facts necessary to a decision are not in dispute. In 1943 and 1944, Mrs. Landon published a literary work entitled "ANNA AND THE KING OF SIAM", first in magazine serial form and later in book form. Mrs. Landon's book was highly successful, having earned for her aggregate revenues from various sources in excess of half-a-million dollars.

In the last part of 1944, Mrs. Landon's agents entered into negotiations with Fox to sell, among other things, the "motion picture rights" to the literary work (Agreement, JA 14-25). Mrs. Landon did not participate in these negotiations personally but was represented

throughout by William Morris Agency, Inc., one of the nation's foremost literary agents in the entertainment field. Although the parties worked with a draft originally submitted by Fox, it is clear from the Record that the William Morris Agency requested and received a number of changes, several of which are pertinent to the issues here (JA 477 h, i).

On or about December 8, 1944, the parties consummated the lengthy, integrated Agreement. Mrs. Landon thereby licensed Fox, among other things, to make one or more motion picture versions of the literary property including sequels, and to exhibit each of these versions and sequels in theaters, on television, and elsewhere. For these rights, Mrs. Landon's agents bargained for, and she received, a series of fixed payments totalling \$67,500.00.

In 1946, pursuant to the Agreement, Fox released for general distribution a motion picture based substantially on the Landon property entitled "ANNA AND THE KING OF SIAM", which was exhibited in theaters and on television. In 1950, Mrs. Landon separately licensed Richard Rodgers and Oscar Hammerstein to create a musical stage play, ultimately entitled "THE KING AND I", based on her literary work (JA 124d-v). Pursuant to the rights it received from

Mrs. Landon under the 1944 Agreement and a separate agreement between Fox and Rodgers and Hammerstein, relating to their stage adaptation, Fox released a second motion picture entitled "THE KING AND I" in 1956. This second motion picture was also exhibited in theaters and on television.

In 1972, Fox made a series of thirteen additional motion picture films for initial broadcast on television based substantially on the Landon property. These were exhibited as one-half hour programs from September, 1972 to December 31, 1972 on the CBS television network under the title "ANNA AND THE KING" (hereinafter "the Series"). The production and television exhibition of these films gave rise to this action.

While Mrs. Landon claims that these films were not "motion picture versions" within the grant of the Agreement, the objective evidence quickly dispels that claim. Each was produced by ordinary motion picture procedures; each was photographed on a motion picture sound stage at the Twentieth Century-Fox Studio in Los Angeles, California, by means of motion picture cameras on motion picture negative film; each was edited in accordance with motion picture editing techniques; the sound tracks were created

by motion picture recording and editing techniques: and each such film was "printed" (that is, developed and processed) by a film laboratory in accordance with usual motion picture procedures. Ultimately, positive color motion picture prints were made for use. The films, as completed, are fully capable of exhibition on television, in theaters and elsewhere on ordinary motion picture equipment, as well as on television. (McIntyre, Aff. ¶ 8: JA 477d, e). Literally and precisely, the films in the Series are motion picture versions of the property.

What is demonstrated by the objective evidence is also confirmed by the Copyright Act, 17 U.S.C. §5, and the regulations promulgated thereunder. Thus, motion pictures are defined in 37 C.F.R. § 202.15 (Motion Pictures [Classes L-M]) as follows*:

* Since Mrs. Landon and her Amicus make passing reference to the Copyright Act as "archaic" and "antiquated" in this respect, we note that the new copyright bill, S.1361, passed by the Senate on September 6, 1974, defines "motion pictures" in a way which is entirely consistent, that is (§101):

"audiovisual works consisting of a series of related images which, when shown in succession, impact [sic - impart] an impression of motion, together with accompanying sounds, if any."

"(a) Photoplays (Class L). This class includes published or unpublished motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, short subjects and animated cartoons having a plot." (Emphasis Supplied)

The Compendium of Copyright Office Practices (1973 Ed.), a government publication and the official "handbook" of the Copyright Office, reconfirms this view by answering the rhetorical question "What is a Motion Picture?", as follows (§2.14.1, page 2-573; JA 477j):

- I. In general. "A motion picture is a series of pictures presenting to the eye the illusion of motion, which pictures are projected on a screen or transmitted by means of television or otherwise, and have as their origin a series of connected pictures on film or other recording media." (Emphasis Supplied)

As we shall demonstrate, these definitions are consistent with the provisions of the Agreement and applicable case law. Mrs. Landon's attempt to retrieve now what she granted to Fox in 1944 is without merit and the conclusion is therefore compelled that summary judgment was properly granted against her claim.

ARGUMENT

I.

UNDER THE CLEAR TERMS OF THE 1944 AGREEMENT BETWEEN MRS. LANDON AND FOX, FOX WAS LICENSED TO MAKE AND EXHIBIT ON TELEVISION A SERIES OF MOTION PICTURES AND, ACCORDINGLY, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE FIRST CLAIM WAS PROPERLY GRANTED.

Since the Agreement gave to Fox the right to make and televise an unlimited number of "motion picture versions", its complete defense to the instant claim is a matter of hornbook law. 2 Nimmer, Copyright, § 144 (1973). The unambiguous language of the Agreement gave Fox the right to make the subject films and televise them.

In order to avoid this result, Mrs. Landon claims that a restrictive definition should be applied to the term "motion picture versions" as used in the Agreement. Thus, she asserts (Br. p. 32) that the words include only feature length motion pictures intended for first exhibition in theaters. The limitation sought is basically absurd. The restriction to "feature length" motion pictures would exclude such conventional motion pictures as shorts, documentaries, "Saturday matinee" serials and travelogues. And, as Judge

Lasker noted, the Agreement itself is no support for the purported restriction to "first exhibition in theaters" (384 F. Supp. at 454):

"It is evident that the grant clauses are broadly drafted and do not contain or suggest the purported distinction between motion pictures made for first exhibition on television and those made for theater presentation."

The purported limitation also founders on the rule of construction enunciated by this Court in Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150 (2d Cir. 1968), cert. denied, 393 U.S. 826. There, this Court rejected plaintiff's claim that a grant of "motion picture rights", which was silent with respect to television rights, should be construed narrowly so as to prevent exhibition of the film "Maytime" on television. This Court held (page 155):

"As between an approach that a 'license of rights in a given medium (e.g., "motion picture rights") includes only such uses as fall within the unambiguous core meaning of the term (e.g., exhibition of motion picture film in motion picture theaters) and exclude any uses which lie within the ambiguous penumbra (e.g., exhibition of motion picture film on television)' and another whereby 'the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license.' [Professor Nimmer] prefers the latter. So do we."

Under this standard, there is no judicial sanction or support for the restrictive definition here sought to be imposed on the sweeping grant of rights actually made.

Mrs. Landon's argument fails for still another significant reason. Thus, while she now claims she broadly reserved television rights, the only reservation actually stated in the Agreement is "the right to broadcast the literary property by television direct from living actors." (Agreement; JA 19). As Judge Lasker noted (384 F.Supp. at 454), the provisions of the Agreement "indicate that when the parties sought to reserve to Landon certain rights, they did so carefully and specifically."* He continued (Id.):

"Such reservations are themselves strong evidence that if Landon had intended to reserve the right to make and exhibit filmed television versions of the property, she and her noted and experienced literary agents, the William Morris Agency, knew how to do so."

* Judge Lasker also found (384 F.Supp. at 454) another indication of careful and precise reservation in the radio clause. Thus, Article FIRST (f), while granting certain radio rights to Fox, carefully and expressly reserved to Mrs. Landon the right to make a radio serial based on the literary property. William Morris Agency requested the restriction in writing (JA 477h). Significantly, no parallel reservation was requested or received in connection with television serials.

As Mrs. Landon testified in this connection
(Dep. p. 122; JA 57):

"I specified those [rights] that
I wanted."

It is perfectly clear under the Bartsch case,
supra, that if an exception, reservation or restrictive
construction is to be made, the grantor has the burden of
framing it at the time the agreement is made, not, as here,
28 years later. The Court there stated, 391 F.2d at 155:

"If the [granting] words are broad
enough to cover the new use, it seems
fairer that the burden of framing and
negotiating an exception should fall on
the grantor; if Bartsch or his assignors
had desired to limit 'exhibition' of the
motion picture to the conventional method
where light is carried from a projector to
a screen directly beheld by the viewer,
they could have said so."

Since it is conceded that the "specific" reserva-
tion is not broad enough to cover the rights she now asserts
(Br. pp. 50-51), and the Agreement contains no other,* there

* A broad reservation to the effect that "everything not
granted is reserved" does not cure the defect. In Bartsch,
the Court dealt with such a provision as follows (391 F.2d
at 154, n.1):

"The plaintiff points to paragraph 13 of the agreement,
reproduced in the text, as indicating an intention to ex-
clude television rights. The provision limits the rights
of the assignee to those 'specifically *** granted herein',
and saves to Bartsch 'all other rights now in existence
or which may hereafter come into existence'. We cannot
read this as standing for more than the truism that what-
ever Bartsch had not granted, he had retained."

is no warrant for finding that Mrs. Landon reserved the right to make television broadcasts from motion picture films.

The reservation of "living actor" television rights negates her position here for yet another reason. If Mrs. Landon had, as she contends, granted only the right to make feature length motion pictures for theater exhibition and the right to televise the same, there would have been no need for her agents to request this specific reservation. That reservation becomes meaningful and necessary only because the other television rights were included in the grant to Fox, and it was therefore necessary to carve out the desired and negotiated reservation.

In summary, the broad terms of the granting clause, together with the narrow reservation actually obtained, confirm the parties' intent to confer on Fox all rights except those specifically reserved. Accordingly, under the applicable rules of construction in the Bartsch case, Fox and CBS were entitled to summary judgment.

* * *

A detailed examination of the pertinent clauses of the Agreement amply confirms this view. Although Mrs. Landon charges that it is "simplistic" (Br. p. 21) to rely

on the plain and obvious meaning of a fully negotiated, integrated, written agreement, it is nevertheless fundamental that "the rights of the parties must be governed by the intent of the parties as evidenced by the terms of the contract when made." Hellman v. Samuel Goldwyn Prods., 26 N.Y. 2d 175, 178 (1970). Where the rights of the parties under the agreement are clear, the case is a proper one for summary judgment. Id. at 181.

In the aggregate, the rights granted to Fox expressly and specifically permit Fox to make and televise the subject films. The rights granted are as follows:

(i) The Sole and Exclusive Right to Make Motion Picture Versions: Beyond any doubt, Fox was expressly granted the right to make an unlimited number of motion pictures based on the literary property. Thus, Mrs. Landon expressly granted to Fox (Agreement, Article FIRST; JA 18):

"(a) The sole and exclusive motion picture rights . . . throughout the world in and to said literary property."

and

"(c) The sole and exclusive right to make, produce . . . and generally deal in and with and copyright motion picture versions of said literary property . . ." [Emphasis supplied]

These grants were "sole and exclusive", thus excluding Mrs. Landon or any other person from "making" motion picture films based on the property. No mention is made in this broad grant of any distinction between motion pictures "made for television" and those made for theatrical distribution; to the contrary, the pertinent language permits Fox to "generally deal in" the motion picture versions. Similarly, there is no mention in the Agreement of any restriction limiting the grant to "feature length" motion pictures.

Films of any length, "feature length" or otherwise, are "motion pictures" under the Copyright Act, Vita-phone Corp. v. Hutchinson Amusement Co., 28 F.Supp. 526 (D.Mass. 1939), conforming to 93 F.2d 176 (1st Cir. 1937), and as used in motion picture agreements. Autry v. Republic Productions, Inc., 213 F.2d 667 (9th Cir. 1954), cert. denied, 348 U.S. 858 (license for "motion picture purposes" permitted cutting or shortening a feature length motion picture to approximately 53 minutes for television broadcasting). On its face, therefore, the Agreement conveyed "the silent, sound, talking and all motion picture rights of every type and nature", G. Ricordi & Co. v. Paramount Pictures, 92 F.Supp. 537, 538 (S.D.N.Y. 1950), modified on other grounds, 189 F.2d 469 (2d Cir. 1951), cert. denied, 342 U.S. 849, regardless of length or place of first exhibition.

(ii) The Right to Make Multiple Versions, Adaptations, and Sequels: Mrs. Landon also expressly granted the right to make any number of motion picture versions of the literary property, including sequels, that is, the right to employ the same characters in different plots or sequences. The Agreement, Article FIRST (c) (JA 18-19) provides:

"(c) The sole and exclusive right to make, produce, adapt . . . motion picture versions of said literary property, . . . and for such purposes to adapt one or more versions of said literary property, to add to and subtract from the literary property, change the descriptions of the said characters, and use all thereof in new versions, adaptations and sequels in any and all languages, and to register and obtain copyright therein, throughout the world." (Emphasis supplied)

It has long been recognized that our courts will not lightly infer a conveyance by an author of the valuable "sequel" right because to do so may deprive an author of his ability to create further stories using the same themes or characters and, thus, deprive him of his livelihood. This principle distinguishes this case from Warner Bros. Pictures v. Columbia Broadcasting Systems, 216 F.2d 945, 950 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955) and Goodis v. United Artists Television, Inc., 425 F.2d 397 (2d Cir. 1970), both of which dealt with agreements which did not mention the right to make "sequels".

The particular significance of the sequel right is illustrated by Goodis v. United Artists Television, Inc., supra, as Judge Lasker noted (384 F.Supp. at 455-56). In Goodis, the plaintiff sold the exclusive "motion picture rights" in the novel "Dark Passage" to Warner Bros. who later produced a motion picture entitled "Dark Passage" and then assigned its rights in the contract to United Artists.

The lawsuit arose because United Artists thereafter produced motion picture films for a television series entitled "The Fugitive", based on the novel. The Goodis contract granted broad "motion picture rights"; reserved "living action television" rights; but, significantly, contained no reference to the making of "sequels".

Judge Mansfield, in the District Court, had no difficulty in finding that the new series of films, produced especially for television, as here, were motion pictures.* This finding, particularly apt here, was not disturbed on appeal.

* The opinion stated, 278 F.Supp. 122, 126 (S.D.N.Y. 1968):

"It is clear that the motion picture film series known as 'The Fugitive' constitutes performances of photoplays as defined in Paragraphs 1(b) and 19(c) [of the agreement] and not 'performances of living actors'."

The decision in this Court ultimately turned on another ground, the absence in the Goodis contract of any provision for the "sequel" rights. This Court highlighted this omission as the basis for its decision that a trial was required to determine the intent of the parties as to whether the new series of films was permitted by the original agreement. It stated as follows (425 F.2d at 406):

"[I]t would be rash of us to hold on summary judgment that the sale of rights in one of an author's works ends, without specific mention that it ends, the author's exclusive ownership of the valuable characters he created in that one work, when he well may desire to create sequels of his own using these same characters." [Emphasis supplied]

In this case, unlike Goodis, the Agreement not only "specifically mentions" the right to make "sequels", it expressly conveys this "sole and exclusive" right to Fox and thus unequivocally extinguishes Mrs. Landon's right to make motion picture films based on or deriving from the original story. Clearly, if sequel rights had been granted in Goodis, there would have been no need for an evidentiary hearing as to the general "customs and expectations" of authors (425 F.2d at 406) who reserve such rights. Since Mrs. Landon did grant sequel rights, the clear implication of the Goodis case is that she granted the right to make a series of films for, among other purposes, initial broadcast on television.

(iii) The Right to Exhibit Motion Pictures by

Television Broadcast: Television exhibition of one or more motion pictures, including sequels, was also contemplated and expressly authorized. Thus, Mrs. Landon granted to Fox (Agreement, Article FIRST [f]; JA 19-20):

"(f) The sole and exclusive right to broadcast by means of the method generally known and described as television . . . any of the motion picture versions of said literary property produced pursuant hereto."

It is thus clear that the sweeping grant of "television rights" was unencumbered by any limitation as to the length of the motion picture films or the place of their first exhibition. To the contrary, the Agreement makes clear (Agreement, Article SECOND [b]) that Fox was free to pick and choose among the rights granted. It was "under no obligation whatever to exercise or put to use any of the rights acquired. . ." and, a fortiori, was under no obligation to exhibit pictures in theaters prior to their exhibition on television or elsewhere. In light of this clause, it is clear that the right to "generally deal in" (Agreement FIRST [c]) films in any media did not carry with it a hidden restriction as to the order or manner of first exhibition.

For these reasons, the straightforward meaning of the Agreement itself compels the conclusion that Fox did no more than it was expressly permitted to do.

* * *

The related provisions of the Agreement amply confirm its plain meaning and broad grant; they are correspondingly inconsistent with Mrs. Landon's present position.

We have previously noted the express reservation of radio serial rights (supra, p. 11 note) and live actor television rights (supra, p. 11 et seq.) to Mrs. Landon, as well as the legal consequences flowing therefrom.

In connection with the latter, it is also noteworthy that the limited reservation of the right to televise direct from "living actors" was subject to a covenant restricting the time of exercise for a substantial period following either the general release of the "first" motion picture based on the book or the execution of the Agreement. (See, Agreement, Article FIRST [f] and [g]; JA 19-20).

As Judge Lasker said, however (384 F.Supp. at 454):

"In view of this covenant obviously drafted to protect Fox from Landon's competition with Fox's own films, it is far-fetched* to believe that the parties so

* Despite Judge Lasker's statement that it is "far-fetched", Mrs. Landon concedes that this is, in fact, her position (Br. p. 51, n.21):

"There was no time limitation on Mrs. Landon's ability to exercise or convey her non-live television rights, provided she gave Fox a right of first refusal on any such exercise or conveyance."

carefully restricted Landon's right to exhibit live television performance only to leave her completely free to show an unlimited number of filmed television versions of the property."

The absurdity of the necessary result caused the Court to squarely reject an argument identical to Mrs. Landon's in Wexley v. KTTV, Inc., 108 F.Supp. 558 (S.D. Cal. 1952), aff'd, 220 F.2d 438 (9th Cir. 1955). The contract in that case, like the Agreement, contained a clause reserving to the grantor "live actor/television" rights, subject to a restraint as to the time of the exercise. Particularly apt to this case is the Court's following comment (108 F.Supp. at 560):

"How illogical it would be to believe that the parties intended the grantor to have the immediate right to exhibit pictures on television while restricting the less competitive 'live television' for fifteen years.

"The obvious reason for applying the fifteen-year restriction to 'live television' only, was because it was considered the most serious competition to the exhibition of motion pictures. It it were intended to leave in the grantor the right to exhibit motion pictures on television, the parties unquestionably would have applied the fifteen-year restriction to such right." [emphasis in original]

Still another reason emerges for rejecting Mrs. Landon's claim that she retained, by implication, the right to make "television versions" by any process, including motion picture film. To implement or exercise such a right, Mrs. Landon would have to have an additional right to make or have made "motion pictures".* Yet, this right of making motion pictures is the essence of the sole and exclusive license granted to Fox (Agreement, Article FIRST [c]; JA 18-19). Similarly, it is clear from the Agreement (Article FIRST [b]; JA 18) that Mrs. Landon conveyed the sole and exclusive right:

" . . . to mechanically produce, reproduce and license the reproduction of spoken words taken from and/or based upon the text or theme of said literary property, on records, films or other devices designed and/or used for the purpose of producing and reproducing sound in synchronism with, accompaniment of or supplementary to motion pictures"

Mrs. Landon thus conveyed to Fox the exclusive right to make sound recordings of the story on records, films or other devices. Thus, even in her view, she would have the right, at most, to make only "silent" films for television exhibition.

Deadlocks of this nature are highly disfavored, and such a result is an additional strong reason for

* The right to "make any other version" is a separate right under the Copyright Law, 17 U.S.C. § 1(b), without regard to the intended use of the tangible copy so made.

avoiding the construction of the Agreement suggested by Mrs. Landon.* As the Second Circuit said in Bartsch, supra (391 F.2d at 155):

"A further reason favoring the broader view in a case like this is that it provides a single person who can make the copyrighted work available to the public over the penumbral medium, whereas the narrower one involves the risk that a deadlock between the grantor and the grantee might prevent the work's being shown over the new medium at all."

* * *

* We advert briefly to one further point. Assuming, arguendo, that Mrs. Landon retained some right to make "television versions", in 1944, it is clear that she has since perpetually precluded herself from exercising such rights. In her 1950 Agreement with Rodgers and Hammerstein (Dx 34 Id., Landon, Dep. p. 180; JA 124d et seq.), a rider (which does not appear anywhere in the 1944 Agreement) expressly reserves to Mrs. Landon "television rights in the book" but "subject to the contract between [Mrs. Landon] and Twentieth Century-Fox. . . ." (JA 124n) By the same 1950 provision, however, Mrs. Landon agreed that she would not be able "to exercise . . . such television rights in the original book or any part thereof or any version thereof" for a term of years defined as "the television rights restricted period" which term could be extended perpetually by additional payments. Rodgers and Hammerstein in fact have made all such payments, thus precluding her from exercising any television rights at all. (Landon, Dep. pp. 184-85; JA 68f-g)

It is thus doubly clear that she is in no position to exercise any right to make films for television at the present both (i) because she has no right to "make" motion pictures for any purpose and (ii) because she now has no right to televise any "version" of the book whatsoever. This double deadlock, arising from Mrs. Landon's proposed construction, serves as still another reason to construe the Agreement in accord with its plain meaning.

In summary, Mrs. Landon's broad grant to Fox of "motion picture" and allied rights may not be encumbered with exceptions and reservations not expressly stated in the Agreement. For all of these reasons, the District Court was fully justified in holding that the Agreement, on its face, expressly conveyed to Fox the rights now in dispute.

II.

MRS. LANDON'S ARGUMENTS DO
NOT RAISE ANY TRIABLE ISSUES
OF MATERIAL FACT.

The heart of Mrs. Landon's contention is as follows (Br. p. 13):

" . . . [T]here was a clear-cut distinction in the trade, known to the parties, between a motion picture as an art form for the theatrical market (known as a 'motion picture version') and a series of television programs, whether on film or live or otherwise for the television market (known as a 'television series' or 'television versions')."

Despite her repeated assertion, both in the Court below (Br. p. 19 note) and here (e.g., Br. pp. 21, 27 note 11) that the Agreement contains no ambiguity, and despite her cross-motion for summary judgment on this ground, Mrs. Landon's attempt to interpret the Agreement by reference to this purported dichotomy depends entirely on the introduction of alleged "extrinsic evidence." The Court below properly rejected this attempt, finding no ambiguity which justified recourse to such evidence. Judge Lasker stated (384 F.Supp. at 456-57):

"It is, of course, a familiar principle that where the terms of a contract are ambiguous, such evidence may be introduced, not to vary the meaning of a contract but to establish the intent of the parties. But in the context here, the terms of the contract are not ambiguous and do not raise a triable issue of fact."

Assuming arguendo that ambiguities exist, it is clear nevertheless that Mrs. Landon has not sustained her burden of coming forward with "evidence" sufficient to show an ambiguity or otherwise raise a triable issue of material fact.

Rule 56(e), F.R. Civ. P., squarely places the burden on the party opposing summary judgment to come forward with specific facts in the form of competent and admissible proof raising genuine issues for trial. See, e.g., Donnelly v. Guion, 467 F.2d 290, 293-94 (2d Cir. 1972).

Mrs. Landon attempts to avoid this burden by reliance on a repudiated rule of law, asserting that the "slightest doubt as to the facts" precludes summary judgment (see, Br. pp. 15, 38-40). As this Court has repeatedly made clear, however, that standard has long since been abandoned under the amendments to Rule 56(e) adopted in 1963. See Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972):

"* * * The rule of Arnstein v. Porter, 154 F.2d 464, 468 (2 Cir. 1946), that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts no longer is good law.
[Citations omitted]

* * *

"When the movant comes forward with facts showing that his adversary's case is baseless, the opponent cannot rest on the allegations of the complaint but must adduce factual material which raises a substantial question of the veracity or completeness of the movant's showing or presents countervailing facts."

Measured against the appropriate standard, it is clear that Mrs. Landon's arguments -- based on a melange of financial reports unrelated to the Agreement in substance or time, her uncommunicated intent and extraneous agreements -- were insufficient to raise any triable, genuine factual issue which defeats summary judgment. We examine her three main arguments in turn.

1. "Technical Evidence" of "Custom and Usage."

Although she strenuously argues that "technical evidence" would be admissible to support her position, the argument is altogether hypothetical because Mrs. Landon has not proffered any competent "technical evidence" probative of the purported "custom and usage" she urges.

In order to avoid or vary the plain meaning of words, such evidence must at least tend to show a "custom and usage" which is "of so long continuance, so well established, so notorious, so universal and so reasonable in itself, as that the presumption is violent that the parties contracted with reference to it, and made it a part of the agreement." Wells v. Bailey, 49 N.Y. 464, 472-73 (1872); see, also, Frigaliment Importing Co. v. BNS International Sales Corp., 190 F.Supp. 116 (S.D.N.Y. 1960); Eskimo Pie Corporation v. Whitelawn Dairies, Inc., 284 F.Supp. 987, 993-94 (S.D.N.Y. 1968) (Mansfield, J.).

Several financial reports prepared by Fox between 1954 and 1972 were identified in an affidavit of Herbert Fierst, one of Mrs. Landon's attorneys.* (Br. pp. 22 et seq.) The documents -- prepared years and decades after the fact -- are not probative of a purported custom and usage in 1944.

Even more to the point, the terms "motion picture versions" and "television versions" are nowhere used in any of the subject documents; needless to say, there is no discussion in these documents of the technical meanings of these words as understood in the motion picture business in 1944, and there is no indication at all of the narrow definition of "motion picture versions" Mrs. Landon advances. The wide variety of descriptive terms actually used in these documents blurs any distinction, rather than creating one.** If pertinent at all, these documents merely show that Fox created motion pictures for exhibition in theaters, on television and elsewhere and treated the income from all of these sources under the general headings of "Film Rentals" (JA 399) or simply "Revenues" (JA 414).

* The brief also mentions a sentence of testimony from an unrelated case in 1956. Our remarks concerning the immateriality of the financial reports pertain equally to it.

** E.g., some of the terms are, "film series specifically for television," "films made especially for television," "television films," "feature film," "feature films licensed for television," etc.

In contrast to this purported "extrinsic evidence", the affidavits of Helen Strauss, Mrs. Landon's agent (JA 470-73) and Harry McIntyre (JA 477a-i) reflect the actual custom and usage of the business. Their understanding is further confirmed by the directly pertinent finding in the case of Hollywood Plays, Inc. v. Columbia Pictures Corporation, 77 N.Y.S.2d 568 (Sup. Ct. N.Y. Co. 1947), aff'd, 274 App. Div. 912 (1st Dep't), rev'd on other grounds, 299 N.Y. 61 (1949). There, the Court examined the prevailing custom and usage in New York in or about 1943 to determine the meaning of the term "motion picture rights." It found as follows (page 576):

"The oral testimony, supplemented by the defendant's own documentary evidence, was most impressive that motion picture producers, in negotiating for and acquiring motion picture rights to a play, concurrently insist upon the transfer to them, as part of the sale, of television and radio rights to the play; and that such television and radio rights are included or embraced in the general expression 'motion picture rights'."

The proffered documents are not, in any sense, to the contrary and accordingly raise no issue for trial.

2. Mrs. Landon's Subjective Intent.

Mrs. Landon's uncommunicated understanding of the words used in the Agreement is irrelevant and clearly inadmissible, and thus does not create a material issue

of fact under Rule 56.* Accordingly, it, too was properly disregarded on the motion below.

Whatever Mrs. Landon's subjective intent may have been in 1944, she nowhere asserts that she articulated or otherwise manifested that intent or understanding to Fox. She had no direct contact with Fox. Similarly, despite the argumentative characterizations in Mrs. Landon's present brief (Br. p. 36), there is no assertion in the carefully constructed Taylor affidavit, submitted in support of her motion, that he or any other employee of William Morris Agency communicated their purported definitions (or those of Mrs. Landon) to Fox at the time the

* It is not clear why Mrs. Landon adverts to this testimony at all. Although her brief goes on for several pages (Br. pp. 29-34) on this topic, it is later conceded that Mrs. Landon did not advance this evidence for the purpose of creating a material issue of fact (Br. p. 35):

" . . . [w]e did not take the position before the District Court that Mrs. Landon's intention in 1944 presented an issue of disputed fact requiring a trial on the merits."

Mrs. Landon's intention, whatever it may have been, is irrelevant and not material. The District Court agreed with this proposition (384 F.Supp. at 457).

Agreement was negotiated.* Instead, Taylor rests upon his conclusory assertion of what the other party had in mind. We are confident that, had any discussion occurred in which Fox manifested such an understanding, plaintiff's counsel would have brought facts, rather than argumentative conclusions, to the attention of the Court below, with full particulars.** Helen Strauss, Landon's agent, did not communicate any such intent to Fox. In fact it is contrary to her understanding of what the Agreement conveyed (JA 472-73) and what Mrs. Landon said she wanted.

-
- * To the contrary, Taylor's conclusory affidavit was apparently based on the misconception (which pervaded Mrs. Landon's presentation below) that Fox used two different forms of contract in New York to acquire separate rights. Thus, he says (JA 128):

"This [Mrs. Landon's intention] was understood by Fox's representatives and is the obvious reason for the absence of any reference to 'television versions' in the grant clause. . . ."

As we show, *infra*, pp. 34-36, Taylor's conclusion was rebutted by the undisputed facts in the Record. The absence of the phrase reflects no such understanding on the part of Fox's New York attorneys.

- ** It should be noted that the parties stipulated to an extended briefing schedule, running from April 12 to July 3, 1974. After reply papers were served by defendants on June 28, plaintiff did not request any relief under Rule 56(f) or ask defendants' counsel for additional time to supplement their proof. Obviously, they had nothing further to offer.

Mrs. Landon's alleged intent was properly disregarded under the long-standing rule that the unexpressed intent of a party as to the meaning of an agreement is not admissible in evidence (Krstovic v. Van Buren, 235 N.Y. 96 (1923); Riley v. Mayor of N.Y., 96 N.Y. 331, 339 (1884); Dillon v. Anderson, 43 N.Y. 231, 236-37 (1870); Richardson on Evidence, § 364 at page 334 (1973 Ed.). See, United States Nav. Co. v. Black Diamond Lines, 147 F.2d 958 (2d Cir. 1945)), as well as under the parol evidence rule precluding testimony concerning negotiations which tend to vary the terms of an integrated agreement. See, e.g., Eskimo Pie Corporation v. Whitelawn Dairies, Inc., 284 F.Supp. 987, 993-94 (S.D.N.Y. 1968) (Mansfield, J.).

Under New York law, Mrs. Landon is bound by the intent expressed and manifested in the unambiguous words of the integrated written agreement and cannot create issues of fact concerning her private intent, whether or not expressed in preliminary negotiations. Laba v. Carey, 29 N.Y. 2d 302 (1971); Wilson Sullivan Co. v. Int'l Paper Makers Realty Corp., 307 N.Y. 20, 25 (1954). As the Court said in Raleigh Asso. v. Henry, 302 N.Y. 467, 473 (1951):

"In resolving that question [i.e. the construction of a lease], we concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote. . . ."

Just as parol evidence would be inadmissible on trial, it is impermissible to defeat a motion for summary judgment. See, e.g., Gelfand v. Tanner Motor Tours, Ltd., 450 F.2d 786 (2d Cir. 1971); Leumi Fin. Corp. v. Richter, 17 N.Y.2d 166, 173 (1966); Songer v. Mack Trucks, Inc., 23 A.D.2d 544 (1st Dep't 1965).

It is for these reasons, as well, that the purported factual and other disputes between Mrs. Landon and her former agent, Helen Strauss (see Br. pp. 35-38) are completely irrelevant to any triable issue of material fact.*

* Mrs. Landon's Brief recites as purported issues the following (Br. p. 37):

"The foregoing issues of fact -- namely what was Mrs. Landon's intention and her understanding of Fox's intention in 1944; who really negotiated with Fox; was Mrs. Landon's intention to reserve television rights actually communicated to Fox; and did Fox understand Mrs. Landon's intention -- were all raised by Helen Strauss' counter-affidavit that was submitted by Appellees to defeat Mrs. Landon's motion for summary judgment."

On defendants' theory, which Judge Lasker adopted, none of these issues is material to a resolution of the case. Defendants were nevertheless entitled to dispute them, on Mrs. Landon's cross-motion, without jeopardizing their own motion. See, Walling v. Richmond Screw Anchor Co., 144 F.2d 780, 784 (2d Cir. 1946), cert. denied, 328 U.S. 870, where the court held:

"[A]lthough a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."

See, also, 6 Moore Fed. Prac. ¶ 56.13, "Effect of Cross Motions."

Whatever subjective thoughts or intentions Mrs. Landon may have had, if any, with respect to the issue raised here, they did not find expression in the Agreement or in any negotiations or discussions with Fox. For both these reasons, they are plainly inadmissible and did not furnish a basis for denying defendants' motion for summary judgment.

3. Fox's Purported Contracting Practice

Mrs. Landon's third argument arose from a textual variation, on which she seized, between Fox contracts, some of which, unlike Mrs. Landon's, used the term "motion picture and television versions." Without making any inquiry as to the basis or origin of this variation, Mrs. Landon erroneously concluded that "two different rights [were] available for purchase. . ." (Br. p. 48).

In reaching this conclusion, Mrs. Landon was apparently unaware that the difference arose, not because Fox intended to acquire different rights, but because Fox had two separate legal departments -- in New York and Los Angeles -- which employed different language, in this and other clauses, to reach the same ends. As Judge Lasker noted concerning Mrs. Landon's argument (384 F. Supp. at 456):

"The contention is effectively rebutted by the undisputed facts that (1) Fox maintained both East coast and West coast legal

departments, each with its own drafting style, and (2) Landon's contract was drafted in the [New York] office which, as a matter of consistent practice, did not use the magic words 'television versions' to acquire the rights in issue here, relying instead on general language to achieve the same result."

Thus, Mrs. Landon's speculative argument, based on the mistaken premise that Fox used two different forms to acquire two different rights, foundered on the facts -- the pertinent legal department in New York did not use the two different forms she suggested. As a result, these various extraneous agreements do not serve to show that Fox, acting through its New York legal department, treated the rights as separate and distinct or that it intended not to acquire the rights here in issue.*

Mrs. Landon's fall-back "explanation" (Br. p. 66), that the "West coast legal department was more perceptive than its East coast counterpart," does not stand up to scrutiny either. As the New York court stated in 1946 in Hollywood Plays, Inc. v. Columbia Pictures Corporation, supra,

* Davis v. E. I. duPont de Nemours & Co., 240 F.Supp. 612 (S.D.N.Y. 1965) does not advance Mrs. Landon's case. The pertinent agreement there bore internal evidence that the rights were not considered by the parties to be co-extensive. Thus, in several clauses of that agreement, the parties used both terms, "dramatic rights" and "motion picture rights." In the pertinent clause, one of those terms was omitted.

77 N.Y.S.2d at 576, "motion picture producers, in negotiating for and acquiring motion picture rights to a play, concurrently insist upon the transfer to them, as part of the sale, of television and radio rights"

Mrs. Landon's further efforts to repair the fallacious original argument wander into a new order of speculation, completely outside the Record.

First, she asserts, in passing and without Record support, that "Fox was a highly centralized corporation under Darryl Zanuck" (Br. p. 57). This is neither true* nor evidentiary and does not controvert the sworn testimony of Harry McIntyre (then an attorney for Fox in New York) and Frank Ferguson (then a Fox attorney in California) that Fox's legal departments were then "largely autonomous, and, in many circumstances, developed different styles, practices and formats" to achieve the same ends. (Ferguson, Aff., JA 474a; see, also, McIntyre, Aff., JA 477c, d).

Her principal complaint, that Fox made "belated revelations about the two legal departments" (Br. p. 57), derives solely from her failure to inquire, not from any inadequacy in the responses Fox gave to questions actually posed. No oral discovery or interrogatories were sought or

* Zanuck was a vice-president at the time. Spyros Skouras was president. See, Landon Br. p. 24, n. 8.

taken by Mrs. Landon, either as part of the normal pretrial proceedings or pursuant to Rule 56(f), F.R.Civ.P., after her counsel became aware of their mistake below, although the rule is expressly intended for this purpose. Speculation and conjecture, on appeal, about what might have been developed does not advance her present case. Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952); Adkins v. E. I. duPont de Nemours & Co., 181 F.2d 641 (10th Cir. 1950), cert. denied, 340 U.S. 835; Robbins v. Gould, 278 F.2d 116 (5th Cir. 1960).*

The result -- uncontroverted in the Record -- is that Fox never had the practice which Mrs. Landon conjured up and on which she so heavily relied. The East Coast legal department did not add the magic words "television versions" when it desired to acquire the rights here in issue, nor did it treat "motion picture versions" separately

* Mrs. Landon also speculates (Br. p. 62) that several of the West Coast contracts were executed in New York, and, therefore, may have been drafted by the East Coast legal department. This is surmise unsupported by the Record, and should be disregarded. Thomas v. Mutual Benefit Health & Accident Ass'n, 220 F.2d 17 (2d Cir. 1955). Had Mrs. Landon inquired, documents were available to show that the contracts were drafted in Los Angeles and transmitted to New York for execution.

from "television versions". As a result, no "contracting practice" helpful to Mrs. Landon ever existed.

The foregoing reasons substantially confirm the wisdom of this Court in the Bartsch case in refusing to find a particular contractual intent by comparing the particular phrases or words in one contract with those employed in various other contracts. The Court there held that such a comparison (391 F.2d at 154-55):

"is not enough to show that the Bartsch assignments were a case of that sort. For all that appears Warner Brothers may have decided that, in dealing with Bartsch, it would be better tactics to rely on general words that were sufficiently broad rather than seek an express inclusion and perhaps end up with the opposite, or may have used a form regular in the industry without thinking very precisely about television, or -- perhaps most likely -- may simply have parroted the language in the grant from Bartsch's assignors to him on the theory it would thus be getting all he had, whatever that might be."*

* Preminger v. Columbia Pictures Corp., 49 Misc.2d 363 (Sup.Ct. N.Y.Co. 1966), aff'd, 25 A.D.2d 830 (1st Dep't 1966), aff'd, 18 N.Y.2d 659 (1966), is not to the contrary. The Court held that where Preminger failed expressly to reserve a right, i.e., to have the final control of editing for television broadcast, none would be implied. The contracts with which comparison was sought contained precisely that reservation, while the contract at issue did not contain any comparable language.

In sum, there is no probative value to be found in the comparisons made, and accordingly no evidence raising a material issue of fact.

4. Plaintiff's Further Arguments Are Without Merit.

Plaintiff makes certain additional arguments which are readily rebutted. Thus, she asserts (Br. p. 50) that the word "specifically" in the living actor reservation (Agreement, Article FIRST [f]) is not a word of limitation, but instead expands the reservation to embrace further reservations not otherwise set forth. If words are to be given the meaning ordinarily ascribed, this contention is simply frivolous. This is particularly true since a specific reservation is always to be narrowly, rather than broadly, construed in accordance with the maxim expressio unius. Manners v. Morosco, 258 Fed. 557, 560 (2d Cir. 1919), rev'd on other grounds, 252 U.S. 317; Wexley v. KTTV, Inc., 108 F.Supp. 558, 559 (S.D.Cal. 1952).

Mrs. Landon constructs a further fallacious argument (Br. p. 51) by wrenching out of context the words "or otherwise", from the Agreement (Article FIRST [f]). The quoted words are obviously intended to echo and repeat a phrase in the preceding sentence by which Mrs. Landon agreed, for a period of ten years, not to exercise her reserved

right to broadcast the literary property "by television or by any other device. . . ." "Otherwise" here clearly refers to the lengthy phrase commencing "any other device" and obviously has no significance beyond that.

Mrs. Landon also points (Br. pp. 48-49) to a 1968 agreement which, in a footnote, refers expressly to "television series rights". But this agreement was (i) entered into some 24 years later and (ii) Fox was not a signatory. Its relevance to the case is non-existent.

* * *

To summarize, the Agreement between Mrs. Landon and Fox expressly gave Fox the right to make an unlimited number of "motion picture versions" of her literary work and the further right to televise these films. The series of films made by Fox here at issue were "motion picture versions", physically, in production technique, and under the Copyright law and the decided cases. For this reason, Fox was expressly licensed to make the film series for television under the plain meaning of the Agreement. The Agreement is clear and unambiguous and Mrs. Landon's contentions do not raise material issues of fact requiring a trial.

For all these reasons, defendants' motion for summary judgment was properly granted. The judgment below should be affirmed.

III.

THE DISTRICT COURT CORRECTLY HELD THAT THE SECOND CLAIM WAS INSUFFICIENT AS A MATTER OF LAW, AND WAS FURTHER BARRED BY THE STATUTE OF LIMITATIONS.

There Can Be No Unlawful Tie-in In The Absence of Actual Coercion

As noted, Mrs. Landon did not brief the dismissal of the purported antitrust count and has not stated it as an Issue Presented, as required by Rule 28(a), F.R. App.P. Instead, she adopts (Br. p. 4) an amicus brief filed by the Authors League of America, Inc. ("Amicus Br., p. -- ").

The Amicus asserts that a simultaneous license of rights under the original and renewal copyright terms constitutes an illegal "tie-in" under the antitrust laws. This claim suffers from a number of infirmities, including the absence of any authority for the underlying contention that a license of both original and renewal rights under a copyright can constitute a "tie-in",* and the further

* United States v. Loew's, 371 U.S. 38, and United States v. Paramount Pictures, 334 U.S. 131, did not involve any alleged tie-in of original and renewal terms. The tie-in arrangements therein related to block sales of different motion pictures.

absence of authority for the proposition that a buyer, such as Fox, can initiate an illegal tie-in arrangement.*

But, more significantly, the Amicus fails to meet the central defect which the District Court found defeated this claim, that is, the absence of any "exercise of actual coercion", although such proof is "a necessary element of an unlawful tying arrangement" (384 F.Supp. at 457). See, e.g., Ford Motor Co. v. United States, 335 U.S. 303 (1948); Belliston v. Texaco, Inc., 455 F.2d 175, 183-84 (10th Cir. 1972), cert. denied, 408 U.S. 928.

Mrs. Landon has never claimed that her agents asked to license the renewal term separately and she flatly concedes that she never made such a request. She testified at her deposition as follows (Landon, Dep. p. 266; JA 73e):

"Q. In the context of the Twentieth Century-Fox contract in 1944 was there ever any discussion that you recall on the question of copyright renewals?

"A. I don't recall any."

Under the decided cases, this admission defeats the purported tie-in claim. In American Mfg. Mut. Ins. Co.

* Mandeville Island Sugar Farms v. American Crystal Sugar Co., 334 U.S. 219, cited at Amicus Br. p. 19, involved a price fixing conspiracy by buyers. United States v. Griffith, 334 U.S. 100 (cited ibid.) was also a conspiracy case. It involved an attempt to extend the defendants' existing monopoly in "single-theater" towns to gain an unfair advantage over competing theater owners in other localities where the defendants also owned theaters.

v. American Broadcasting Paramount Theatres, 446 F.2d 1131 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972), the plaintiff alleged that it was forced by ABC to sponsor a broadcast over a number of unwanted stations in order to obtain sponsorship of a television program over stations it wanted to use. The District Court found that plaintiff, unlike Mrs. Landon, did make an initial unsuccessful request to eliminate the unwanted stations, but thereafter "did not seriously bargain" for their elimination (446 F.2d 1133). In holding that no unlawful tie-in existed under these circumstances, this Court discussed and distinguished United States v. Loew's, Inc., 371 U.S. 38 (1962), upon which the Amicus seeks to rely (Amicus Br. pp. 21, 22-23):

"In Loew's the 'acts found to be illegal' were those of motion picture distributors who conditioned the license and sale of feature films on the acceptance of unwanted or inferior films ***.' The 'gravamen' of the complaint was the 'successful pressure applied to television station customers to accept inferior films ***.' Id. at 40, 83 S.Ct. at 99 (emphasis added). Here, ABC exerted no pressure on Kemper, successful or not. *** But there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.

* * *

"Foreclosure implies actual exertion of economic muscle, not a mere statement of bargaining terms which, if they should be enforced by market power would then incorporate an illegal tie." 446 F.2d at 1137 [Emphasis supplied]

An earlier decision in the American Mfg. case, inaptly cited by Amicus (Amicus Br. pp. 25-26), is not to the contrary. Although a plaintiff is not required to resist a coerced tie-in where to do so would be to "joust with windmills", American Mfg. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, 388 F.2d 272, 285 (1967), the plaintiff must show some effort to eliminate the unwanted "tie". As the Court there made clear, the pertinent question was whether plaintiff acted reasonably when it "capitulated to ABC's demands" (p. 285, n. 19).

In Mrs. Landon's case, despite a negotiating history which demonstrates several changes of substance which Mrs. Landon sought and received (see, JA 477h, i), there is no showing of any attempt to eliminate the renewal term provision; a fortiori, no claim can be asserted that there was "successful pressure" or "actual exertion of economic muscle". In the present case, there were no "demands" with respect to the renewal term, and hence no "capitulation".

Contrary to the Amicus' argument (Amicus Br. p. 24), "sufficient economic power", without more, is not enough to "make a tying arrangement illegal". This theory has been uniformly rejected by the courts. The decision of this Court in Capital Temporaries, Inc. of Hartford v. The Olsten

Corp., ___ F.2d ___, 1974-2 CCH Trade Cases, Para. 75,303, aff'g, 365 F.Supp. 888 (D.Conn. 1973) is apposite. In granting summary judgment, the District Court had held (365 F.Supp. at 892):

"It must be emphasized that Fortner does not hold that the mere existence of economic power in a seller is enough to meet the first criterion needed to establish the illegality of a tie-in. The economic power must not simply exist; it must be used." [Emphasis supplied]

This Court affirmed, holding that a tie-in claim can only be asserted by "the unwilling purchaser of an unwanted product" (1974-2 Trade Cases at ¶ 97,954). It stated (ibid.):

"To that extent there must be a showing of some pressure exerted upon him. This principle has been articulated in this court by Chief Judge Kaufman in American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971), cert. denied, 404 U.S. 1063 (1972): '[T]here can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice.'"

Cases from other jurisdictions are uniformly to the same effect; Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 1974-2 CCH Trade Cases, Para. 75,422 (S.D. Fla. 1974); In re 7-Eleven Franchise Antitrust Litigation, 1974-2 CCH Trade Cases, Para. 75,429 (N.D.Cal. 1974); Abercrombie v. Lum's, Inc., 345 F.Supp. 387 (S.D.Fla. 1972); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

The principle that "actual coercion" is a necessary element of a tie-in claim is supported, not only by the authorities, but also by equity and common sense. Under the reasoning of the Amicus, a party with "sufficient economic power" would act at its peril in every purchase or sale which could be said to involve two separate products, even though the other party is entirely satisfied with the transaction at the time it is made. Such a result would be both unjust and irrational.

The Amicus further urges the general proposition, as did Mrs. Landon below, that summary judgment should not be granted in antitrust actions, citing Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (Amicus Br. p. 26). The Poller case, however, does not support her argument. As this Court recently held in Capital Temporaries, supra, at 1974-2 Trade Cases, para. 97,958:

" . . . Where there is conspiracy or attempt to monopolize, courts do require proof of specific intent, and this normally involves trial. [Citation omitted] We have no such requirement in tying cases. The same argument based upon Poller was recently rejected by this Court in affirming a summary judgment in a tying case. Coniglio v. Highwood Services, Inc., supra, 495 F.2d at 1292-93." [Emphasis supplied]

Since Mrs. Landon has conceded that there was no "actual exertion of economic muscle", her second count is legally insufficient, and summary judgment was properly granted.

Plaintiff's Second Claim is Further
Barred by the Statute of Limitations

The Amicus also argues (Amicus Br. p. 34), as did Mrs. Landon below, that her 28 year-old claim is not barred by the pertinent four year Statute of Limitations, 15 U.S.C. 15(b). The case cited, Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1971), does not support plaintiff's position. That case involved the continuing anticompetitive impact of an international patent pool. The Statute of Limitations was held to be tolled because of the impossibility of proving future damages "in the context of a continuing conspiracy" (401 U.S. at 338). The holding thus has no application to the present action, because the gravamen of Mrs. Landon's claim is that one completed act by Fox, on one specific occasion in 1944, injured her by depriving her of one specific asset, and her claimed damages would have been susceptible of proof at that time. Saunders v. National Basketball Association, 348 F.Supp. 649 (N.D.Ill. 1972).

The Amicus asserts (Amicus Br. p. 37), without citation of authority, that it is "inconceivable" that Mrs. Landon could have recovered damages in 1944 for a wrongful deprivation of her renewal rights. The law is well settled to the contrary. An author's expectancy interest in a copyright renewal is a present asset, which can be assigned

before the expiration of the original copyright term. See, e.g., Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 656 (1943); Miller Music v. Daniels, 362 U.S. 373 (1960). It is equally clear that such an expectancy interest has an ascertainable present value, since an assignment of renewal rights can be attacked for lack of adequate consideration, Rossiter v. Vogel, 148 F.2d 292 (2d Cir. 1945), and the adequacy of consideration is determined as of the time of the transfer, Rose v. Bourne, Inc., 176 F.Supp. 605, 611-612 (S.D.N.Y. 1959), aff'd, 279 F.2d 79, 80-81 (2d Cir. 1960), cert. denied, 364 U.S. 880.

A damage action for the alleged tie-in would not have been precluded by the fact that it would have involved the making of estimates as to future profits from the renewal rights which had been assigned. If a plaintiff establishes the fact of damage, resulting from an antitrust violation, reasonable estimates may be made in computing the amount of damages, and damage awards may include reasonable estimates of future profits. See, e.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906 (2d Cir. 1962), cert. denied, 369 U.S. 865. Thus, assuming Mrs. Landon ever

had a valid claim, she clearly could have sued in 1944, for "not only those damages which [she had] suffered at the date of accrual, but also those which [she would] suffer in the future" from the alleged tie-in. See Zenith Radio Corp. v. Hazeltine Research, supra, 401 U.S. at 338-39.

Further, as the District Court noted (384 F.Supp. at 459):

"[E]ven accepting plaintiff's argument that no estimate of future damages was possible in 1944, when the contract was executed, plaintiff certainly knew by the mid 1950's, after the production of two successful feature films and an enormously popular musical play ('The King and I'), that damages flowing from her alleged loss of renewal rights were ascertainable. Even under the Zenith rule, the statute of limitations is tolled only until the plaintiff is able to prove future damages with reasonable certainty."

It is clear that, "the moment the victim could prove such subsequent damages, the statute begins to run, leaving four more years to assert them." Poster Exchange, Inc. v. National Screen Service Corp., 456 F.2d 662, 667 (5th Cir. 1972).

The Amicus further argues (Amicus Br. pp. 35-36) that Mrs. Landon might have had "no standing" to assert her claim until the original copyright term expired, citing Judge Edelstein's opinion in Carmichael v. Mills Music, Inc.,

121 F.Supp. 43 (S.D.N.Y. 1954). The citation, however, is simply incorrect: Judge Edelstein actually held therein that the plaintiff did have standing to maintain the action prior to the commencement of the renewal term. 121 F.Supp. at pp. 45-46. Further, so far as appears from the opinions, the Statute of Limitations defense was not asserted either in Carmichael, or in Rossiter v. Vogel, 134 F.2d 908 (Amicus Br. p. 35) (an actor by the assignee for specific performance of a contract to assign renewal rights), and neither case involved the antitrust laws.

"[E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." American Pipe & Construction Co. v. Utah, 414 U.S. 538, 554, quoting Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49.

In the present case, Mrs. Landon claims that she was injured by an antitrust violation in 1944, when she willingly conveyed her renewal rights. She waited 28 years to assert that this act, completed in 1944, violated the law. Nothing in the Zenith case excuses her unconscionable delay. The claim is time barred.

CONCLUSION

For all the reasons assigned herein, the judgment below should be in all respects affirmed.

Respectfully submitted,

ROGERS & WELLS
Attorneys for Appellees
200 Park Avenue
New York, New York 10017

Of Counsel:

Youngman, Hungate & Leopold
1801 Century Park East
Los Angeles, California 90067

-and-

William R. Glendon
Guy C. Quinlan
Stepher Froling